Den-Ral, Inc. *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, of the United States and Canada, Local No. 577, AFL–CIO

Ross Brothers Construction Company *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, of the United States and Canada, Local No. 577, AFL–CIO

The Early Construction Company *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, of the United States and Canada, Local No. 577, AFL–CIO

Huntington Piping, Inc. *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, of the United States and Canada, Local No. 577, AFL–CIO. Cases 9–CA–30188, 9–CA–30189, 9–CA–30190, and 9–CA–30191

November 4, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND DEVANEY

On September 8, 1993, Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondents filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

[1] The Respondents have requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondents contend that the judge exhibited bias toward the Respondents. After a careful review of the record, we are satisfied that this allegation is without merit.

We adopt the judge's finding that Local 577's withdrawal from group bargaining was timely and unequivocal. On the facts of this case, we find it unnecessary to pass on whether *Retail Associates*, 120 NLRB 388 (1958), is applicable here. We note that, as the judge found, bargaining over the contractual reopener in March and April 1991 was based on the explicit agreement by the parties that any party had the option, at any time, of ceasing participation in continued group bargaining if it so desired, and that Local 577 expressed its intention to withdraw in June 1991 and again on March 4, 1992.

In dismissing the Respondents' ''counterclaim'' that Local 577 should be found in violation of Sec. 8(b)(3), the judge noted that the Respondents failed to file a charge alleging that Local 577 violated Sec. 8(b)(3). We take administrative notice that on May 10, 1993, such a charge was filed in Case 9–CB–8543 and that the Regional Director approved the withdrawal of the charge on June 1, 1993.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Ross Brothers Construction Company, Ashland, Kentucky, and Huntington Piping, Inc., Huntington, West Virginia, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

Engrid Emerson Vaughan, Esq., for the General Counsel.
C. Robert Schaub, Esq., of Huntington, West Virginia, for Respondent Employers.
Gary A. Snyder, Esq. (Snyder, Rakay & Spicer), of Dayton, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This consolidated matter[1] was heard on May 18 and 19, 1993, in Huntington, West Virginia, upon the General Counsel's consolidated complaint, dated January 8, 1993, and Respondents' timely filed answer served on January 21, 1993.[2] In sub-

[1] Of the four named Employer-Respondents in this proceeding, Den-Ral, Inc. and Early Construction Company entered into settlement agreements with the Charging Party to which the General Counsel did not object and which I approved on the record. Thus the original caption is retained for purposes of conformity with prior records and proceedings notwithstanding the Den-Ral, Inc. and Early Construction Company are no longer parties.

[2] Respondents appended to its answer a motion to dismiss the complaint along with a motion for a more particular statement and a counterclaim. The Division of Judges referred the motion to dismiss directly to the Board on February 3, 1993, pursuant to Sec. 102.24 of the Board's rules. On February 11, 1993, the General Counsel filed an opposition to Respondents' motion to dismss and on February 17, 1993, Respondents filed a reply thereto.

On May 5, 1993, the Board, in an upublished Order, denied Respondents' motion to dismiss and remanded the matter to the Regional Director for further appropriate action. The Board thus rejected Respondents' contention that the Union, having filed a Sec. 301 action (alleging violation of the collective-bargaining agreement) prior to filing the unfair labor practice charge gave the Federal district court ''prior and primary'' jurisdiction over the issues raised in the Board complaint, thereby depriving the Board of jurisdiction. The Board ruled that the Board and court had concurrent jurisdiction over alleged violations of the collective-bargaining agreement. See *Smith v. Evening News*, 37 U.S. 195, 197 (1962).

Secondly, the Board rejected Respondents' contention that the complaint be dismissed because the Charging Party, Local 577, is not the party to whom Respondents owe a bargaining obligation. The bargaining obligation flows apparently only to the International Union with which Respondents have a collective-bargaining agreement. The Board held that an unfair labor practice charge may be filed by any person including a local union notwithstanding that Respondents' collective-bargaining agreement may actually be with the International Union. See *Postal Service*, 306 NLRB 565 (1992). The Board thus rejected Respondents' contention that the Board is without jurisdiction because the Local Union lacks standing to file the charge.

Lastly, there is Respondents' motion or a more particular statement, requesting ''a more particular statement of the factual basis upon which the Complaint is issued . . . in order that Respondents may adequately respond to said allegations and be prepared to meet

stance, the consolidated complaint alleges violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) in that Respondents failed and refused to bargain collectively in good faith with the exclusive collective-bargaining representative of their employees within the meaning of Section 8(d) of the Act. Particularly, that Respondents' failure and refusal to pay the wages, specified in the agreement to which they are bound, amounted to the repudiation of a wage agreement which, in turn, struck at the heart of the collective-bargaining relationship between the parties and amounted to a repudiation of the collective-bargaining relationship itself. *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1974), enfd. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975).

Respondents filed a timely answer, admitted certain of the allegations, denied others, and denied the commission of unfair labor practices.[3]

At the hearing, all parties were represented by counsel, were given full opportunity to call and examine witnesses, to submit relevant oral and written evidence, and to argue orally on the record. At the close of the hearing, the parties waived final argument and elected to file posthearing briefs. All parties thereafter timely submitted briefs which have been duly considered.

Upon the entire record, including the briefs, and upon my most particular observation of the demeanor of the witnesses as they testified, together with an evaluation of the testimony and other evidence of record, I make the following[4]

FINDINGS OF FACT

I. RESPONDENTS AS STATUTORY EMPLOYERS

(a) The consolidated complaint alleges, and Respondents concede that at all material times, Respondent Ross Brothers, a corporation, with an office and place of business in Ashland, Kentucky, has been engaged in the business of general industrial contracting in the construction industry and, in the 12-month period ending January 8, 1993, in conducting its business operations, purchased and received at its Ashland, Kentucky facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Kentucky. Respondents concede, and I find, that at all material times Ross Brothers has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(b) The complaint alleges, and Respondents admit, that at all material times Respondent Huntington Piping, a corporation, with an office and place of business in Huntington, West Virginia, has been engaged in the business of general industrial contracting in the construction industry and, in the 12-month period preceding January 8, 1993, in conducting its business operations, has purchased and received at its Huntington, West Virginia facility goods valued in excess of $50,000 directly from points outside the State of West Virginia. Respondents concede, and I find, that at all material times Huntington Piping, Inc. has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LOCAL NO. 577, PLUMBERS, AFL–CIO, AND THE UNITED ASSOCIATION OF JOURNEYMEN ETC., AFL–CIO, AS STATUTORY LABOR ORGANIZATIONS

The complaint alleges and Respondents admit that the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (the International or the United Association) has been a labor organization within the meaning of Section 2(5) of the Act. I so find.

Supplementing its answer (par. 3(b)), Respondents also admitted on the record that Local 577 was a labor organization nevertheless reserving the right to change their pleading should further facts warrant a change in position. Neither Respondent further pursued the matter and, I find, on the basis of Respondents' concession that Local 577, at all material times, is a labor organization within the meaning of Section 2(5) of the Act. Such a finding is consistent, of course, with Respondents' counterclaim in which Respondents admitted having made repeated demands upon Local 577 ''to meet and bargain in good faith for the purpose of arriving at an agreement'' between Respondents and Local 577. In addition, where Respondents' counterclaim would have the Board make a finding of an 8(b)(3) violation against Local 577, such a violation can only be made against a statutory labor organization. Affirmative proof of Local 577 status may be found elsewhere in the record such as its constitution and bylaws (G.C. Exh. 3) and its affiliation with the United Association (G.C. Br. 3).

III. THE ALLEGED UNFAIR LABOR PRACTICES

Background

The two Respondents, Ross Brothers and Huntington Piping, are parties to the National Industrial Maintenance Agreement for the United States of America (G.C. Exh. 4) (the NIMA Agreement or NIMA) with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO. Both Respondents concede that they entered into the National Industrial Maintenance Agreement and that at all material times they have been, and are, bound by the terms of the NIMA Agreement with the UA. The agreement contains

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the issues intended to be presented by the General Counsel.'' Not only had Respondents simultaneously filed their answer without particularization as prayed for, but there is no mention of the particular allegations in the complaint forming the basis for Respondents' request. I regard the request for particularization to be without merit particularly because it fails to specify in what regard the allegations of the complaint may not be fully answered under the Board's rules.

[3] As above noted, Respondents appended to their answer a ''counterclaim'' alleging that the failure of Local 577 to meet and bargain in good faith for the purpose of arriving at an agreement constituted a violation of Sec. 8(b)(3) of the Act. Respondents assert that this violation is of such dimension that the complaint should not only be dismissed but that the Board find that Local 577 violated Sec. 8(b)(3) of the Act. The counterclaim is dismissed as without merit. Respondents, having failed to file a charge alleging violation of Sec. 8(b)(3) of the Act, and the Board having failed to issue a complaint alleging such a violation, the Board, sua sponte, may not issue an order finding a violation of that section. The parties, not the General Counsel or the Board, initiate unfair labor practice proceedings.

[4] The underlying unfair labor practice charge in Case 9–CA–30189 against Ross Brothers Construction Company was filed by Local 577, Plumbers, AFL–CIO, on November 30, 1992, with service on Respondent Ross on December 1, 1992. The charge in Case 9–CA–30191 against Huntington Piping, Inc. was filed by Local 577, Plumbers, on November 30, 1992, and served on Respondent Huntington Piping on December 1, 1992.

an automatic renewal clause terminable by either party on 90 days' written notice. No such notice was ever given. That agreement contains the following provisions:

> *ARTICLE VIII—Wages*
>
> Wage rates shall be those as set forth in the current labor agreement of the affiliated Local Union where such work is to be performed and shall be paid to all employees under the terms of this Agreement unless otherwise modified by the National Maintenance Agreements Policy Committee, Inc. Wages shall be paid weekly by check or other legal tender.
>
> When zone type wage structures are provided for in local agreements and are otherwise applicable in the area of the project, the project for the purposes of this Agreement will be considered as if it was within the area of the base zone rate.
>
> *ARTICLE IX—Benefits and other Monetary Funds*
>
> Welfare Funds, Pension Funds, Apprentice Training Funds and other monetary funds called for in the Local Union Labor Agreement shall be paid in accordance with the Local Union Labor Agreement except that no funds shall be paid on a basis which exceed the straight time and overtime provisions of this Agreement. [G.C. Exhs. 4–6.]
>
> *ARTICLE VI—Grievances*
>
> All grievances shall be filed within ten (10) calendar days after the complained-of event arose. Grievances shall be appealed to the next higher step within ten (10) calendar days after the meeting in the lower step. Settlement of grievances may be arrived at in any step of the grievance procedure which will be final and binding on the Union and Employer.
>
> Grievances, other than those pertaining to jurisdiction or general wage rates on any work covered by this Agreement shall be handled in the following manner:
>
> Step 1. Between the Employer's Supervisor and the Local Union Steward at the job site.
>
> Step 2. Between the Business Representative and the Employer's Supervisor at the job site.
>
> Step 3. Between the International Union Representative and the Supervisor or Labor Relations Manager of the Company.
>
> Step 4. If the parties are unable to effect an amicable settlement of adjustment of any grievance or controversy, such grievance or controversy shall be submitted to the National Maintenance Agreements Policy Committee, Inc. for a decision to become effective immediately.
>
> Step 5. Failure of the National Maintenance Agreements Policy Committee, Inc., to reach a decision shall constitute a basis for a submittal of the question to the American Arbitration Association for a binding decision. In such instances, the affected parties to the dispute shall appoint an arbitrator to review the matter and render a binding decision. If the parties are unable to agree upon an arbitrator, the American Arbitration Association shall make the designation. The affected parties to the arbitration shall equally share in the costs, including printing and publication of any record on such arbitration.
>
> The arbitrator shall only have jurisdiction and authority to interpret, apply, or determine compliance with the provisions of this Agreement. Any award of the arbitrator shall be final and binding upon the Employer and the Union. A copy of the award by the arbitrator shall be submitted to the National Maintenance Agreements Policy Committee as soon after such award is rendered.

There is no dispute that the National Maintenance Agreements Policy Committee, mentioned in the above provisions, is an institution consisting of equal members of the UA and employers, established for the purpose, inter alia, of resolving grievances flowing from contract disputes.

In addition, at the hearing, Respondents conceded that the following unit of employees is a unit appropriate for bargaining within the meaning of Section 9(b) of the Act:

> All United Association Employees of the Respondent now employed and employed in the future of maintenance, repair, replacement and renovation in various plants within the geographical jurisdiction of the [Association] [but excluding] general superintendents, superintendents, assistant superintendents, office and clerical employees, watchmen or other professional supervisory employees as defined in the National Labor Relations Act, as amended.

The recognition clause of the NIMA Agreement (art. I) to which the International Union (United Association) and Respondents are bound specifies, inter alia, that the ''[Respondents recognize] the Union herein as duly constituted for the purpose of bargaining collectively and administering this agreement for the members affiliated with the United Association, AFL–CIO.'' Respondents deny (answer, par. 7; Tr. 51) that the United Association has been the exclusive collective-bargaining representative of Respondents' Ross Brothers and Huntington Piping units. I nevertheless conclude that at all material times the United Association has been and is the exclusive bargaining representative of Huntington Piping's and Ross Brothers' unit employees within the meaning of Section 8(f) of the Act, regardless of its 9(a) status.

A. *The Pleadings and Respondents' Concession With Regard to being Bound by the NIMA Agreement*

The General Counsel's consolidated complaint alleges with respect to both Respondents (complaint pars. 6(b) and (c)) that each of them granted recognition to the International Union (UA) as the exclusive collective-bargaining representative in the admittedly appropriate unit (complaint par. 5 as modified at the hearing), by entering into a collective-bargaining agreement (NIMA) with the International Union continuing in effect until terminated by 90 days' written notice from either party, all without regard to whether the majority

status of the International Union has ever been established under Section 9 of the Act.[5]

Respondents' answer admits only that the Respondents herein entered into the NIMA Agreement with the International Union (UA) but denied all other allegations of the complaint including those asserting that Respondents, by virtue of entering into the NIMA Agreement, have caused the International Union (UA) to be the exclusive collective-bargaining representative of Respondents' unit employees and that the Respondents were continually bound by the NIMA Agreement having failed to terminate the agreement by the required 90 days' written notice.[6]

In view of the possible ambiguity concerning the respective Respondents' relationship to the International Union (UA), particularly concerning the International Union's exclusive representative status and the continuing obligation of Respondents to recognize the International as such, there was extensive record clarification on these points (Tr. 55–59). By way of clarification, therefore, Respondents, on the record asserted: ''We have never denied being bound by the NIMA agreement'' (Tr. 57, 58). Thus, the instant case preceded on the assumption that Respondents' concessions concerning being continually bound by the NIMA Agreement, unmodified on the record, remained in full force and effect.

B. *History and Method of Collective Bargaining in the Tri-State Area*

In 1969, following a period of labor-management controversy in the Tri-State area (the confluence of southern Ohio, western West Virginia, and northeastern Kentucky), 40 or more area local unions formed the Tri-State Building Trades Council and through it bargained collectively with its counterpart, the Tri-State Building Contractors Association, composed of 25 or more contractors in the construction industry. All 15 building trades, including at least 3 plumbing locals among which was Local 577, were represented on the labor side; the employer side consisting mostly of heavy industrial contractors. Ordinarily six to eight members from each side were formed into subcommittees to negotiate and report back the results of their negotiations. Special problems peculiar to particular trades were worked out by other subcommittees. The process of wage and fringe benefits negotiation consisted of a wage committee on each side deciding ordinarily on increasing the wages and benefits from the prior contract (Tr. 276). After the council and the Association reached agreement on wages and benefits, individual local labor organizations would bargain in other subcommittees of the Building Trades Council and reach individual agreements pertaining only to the local union with regard to matters other than wages and benefits. The wages and benefits, already agreed upon in prior bargaining, would then be ''plugged'' into the local union agreements.

In 1986–1987 bargaining, Local 577 reached agreement on individual contractual matters (with wages and fringes merely ''plugged'' in) with a group of mechanical contractors, the Southern Ohio Mechanical Contractors Association. The bargainers for this Southern Ohio Association, all members of the Building Trades Contractors Association, executed a 3-year agreement effective June 1, 1987 (G.C. Exh. 5). Respondents Huntington Piping, Inc. and Ross Brothers Construction Co. were separately bound (C.P. Exhs. 3 and 4). There is no dispute that this local agreement, containing wages, benefits, and other terms and conditions of employment is the local agreement referred to in the NIMA Agreement, ''Article VIII-Wages,'' which, as above noted, provides:

> Wage rate shall be those as set forth in the current labor agreement of the affiliated Local Union where such work is to be performed and shall be paid to all employees under the terms of this [NIMA] agreement unless otherwise modified by [NMAPC].

This 3-year agreement between the Southern Ohio Mechanical Contractors Association and Local 577 (G.C. Exh. 5) expiring by its terms on May 31, 1990, was thereafter extended for 1 year to June 1991 and thereafter to May 31, 1992. The wage rates, at the time of 1992 expiration, were $19-per-hour wages; $1.30 local pension; $1.10 national pension; and $2.34 in health and welfare. Thus, a total of $4.74 per hour in fringe benefits beyond the $19-per-hour wages.

Under the terms of the NIMA Agreement, whenever a contractor comes into the nine county, south Ohio Local 577 area, he may, if he desires the advantages of the coverage of the NIMA contract and desires to use Local 577 members for his plumbing function, seek NIMA coverage of his contract. Once NIMA coverage is permitted by the International Union, the contractor working within the jurisdictional area of Local 577 pays the wage rates set forth in the existing labor agreement negotiated by Local 577. Contractors coming into the area, therefore, whatever other bargaining functions they may engage in do not bargain with Local 577 concerning wages and benefits. NIMA contract coverage automatically obligates them, as above noted, to pay the existing, negotiated wage structure in the Local 577 contract. Thus, all competing contractors under NIMA contract coverage face the same contract terms in Local 577's jurisdiction whether or not they are individually bound.

In or about March 1991 the Tri-State Building Contractors Association and the Tri-State Building Trades Council, in the presence of an agreement to expire May 31, 1992, agreed to meet for the purpose of deciding whether to open the terms of the contract over a full year prior to expiration so that the terms of a newly negotiated agreement would further extend

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[5] The General Counsel's complaint also alleges that the International Union enjoys 9(a) majority status. I ignore this allegation as mere confusing surplusage.

As above noted, the NIMA Agreement relating to employers admittedly in the building and construction industry is to be analyzed pursuant to Sec. 8(f) of the Act. Under *John Deklewa & Sons*, 282 NLRB 1375 (1987), the Board presumes that parties in the construction industry intend their relationship to be an 8(f) relationship. *Casale Industries*, 311 NLRB 951 (1993). No evidence of an 9(a) relationship was adduced to rebut this presumption. Furthermore, the above-recognition clause refers to employees ''employed in the future.''

[6] While it is true that the NIMA Agreement contains a 30-day union-security clause, in the absence of preponderant supporting evidence, I am nevertheless unable to find that the International Union enjoys 9(a) status. I find, as above noted, that at all material times, by virtue of entering into the NIMA Agreement, it is the 8(f) exclusive representative in the admittedly appropriate units. Under *Deklewa*, supra, the agreement, during its term, is not only enforceable, but the parties are subject to Sec. 8(a)(5) of the Act with regard to its obligations.

the contract for a period of 3 additional years (Tr. 484), from June 1, 1992, through May 31, 1995. In meetings of subcommittees from both sides, it was agreed, in this setting, that participation by an individual local in these multicraft negotiations through the Building Trades Council did not signify that it would be bound to continue in the negotiations or be bound by the product of the negotiations (Tr. 485–486). It was agreed that any party could merely give notice to the opposing party that it would no longer continue in the negotiations or be a party to any ultimate agreement. Thus, every local union and every contractor had the option, at any time, of ''either going with that [contract negotiations] . . . staying in it or dropping out.'' (Tr. 314; 327.) In particular, every local union had the right to return to its constituency and proceed to the ratification process. If there was no ratification, the union could drop out of further bargaining and not be bound by its results. It could simply ''walk away'' from further bargaining (Tr. 485).

After these March and April 1991 reopened meetings (which continued thereafter and resulted in an August 1991 3-year wage and benefit agreement between the two bargaining groups), Local 577 Business Agent Prater returned to his membership in May 1991, for the purpose of voting to reject or accept the Building Contractor Association's offer of a 3-year extension commencing June 1992. The Local 577 membership voted on the Tri-State Building Contractors' offer of $3.62-per-hour increase over the proposed 3-year period. The membership voted to reject the offer. Prater testified that Local 577 rejected the Tri-State offer because Local 577 was attempting to reach parity with the pay rates and benefits of other trades, particularly the boilermakers who, performing similar work, were paid at higher rates than Local 577 members. In addition, Prater further testified that 10 of 17 Ohio Plumber Locals had higher pay rates than Local 577. In any event, as noted, in May 1991, the Local 577 membership rejected the Tri-State wage and benefit offer.

At a meeting of the Tri-State Building Contractors and Tri-State Trades Council, in early June 1991 (Tr. 490–491), Prater told the Tri-State Building Trades Contractors that Local 577 had rejected the proposed 3-year contract extension and would withdraw from bargaining through the Building Trades Council (''multicraft'' bargaining, Tr. 391). It would comply with the current contract until expiration, May 31, 1992 (Tr. 491). It was not until the following year, March 4, 1992, that, pursuant to the 60-day notice requirement in the expiring agreement (G.C. Exh. 5), Local 577 formally notified both the Tri-State Building and Construction Trades Council and the Tri-State Contractors' Association that it was withdrawing from the Tri-State Trades Council which would no longer be its bargaining agent (G.C. Exh. 6).

Having formally withdrawn on March 4, 1992, from bargaining through the Trades Council with the Tri-State Building Contractors, Local 577, on March 6, 1992, notified the Mechanical Contractors Association of Southeastern Ohio that it was ready to negotiate a contract with that Association on March 10, 1992 (G.C. Exh. 7). Following bargaining sessions of March 10 and 12, the new Association and Local 577 entered into a 5-year collective-bargaining agreement effective June 1, 1992, to May 31, 1997 (G.C. Exh. 8).[7] After it was executed, as many as 30 contractors signed the new agreement and complied with it. The only employers who have failed and refused to comply with it are the two Respondents herein. The new contract, for the first time, established the ''industrial rate'' at $2.12 per hour higher than a new ''commercial'' rate. The industrial rate, in the first year, was raised by $3.09 per hour.

C. *Respondents' Response to the New Contract and its New Rates*

At least as early as April 8, 1992, Respondents were aware of the new rates in the new contract. On that date, Respondents authorized their bargaining representative, the Tri-State Contract Association, to protest to the Building Trades Council the total $3.09 per hour first year contract wage increase followed by additional increases of $1 per hour in the second and third year (C.P. Exh. 1). The thrust of the letter protested the large wage increases; the bad effect on the contracting business in the Tri-State area; and questioned why Local 577 would ''drop out of our multi-craft negotiations since your Local Union No. 577 has a 16-year historical long-standing bargaining relationship with the Tri-State Contractors Association multi-craft unit?'' (C.P. Exh. 1.) The letter emphasizes that Prater had actively represented Local 577 in two meetings with the Tri-State Contractors' Association in March and April 1991. It also questioned Local 577's good-faith bargaining since it was bargaining with two different employer groups at the same time.

D. *Respondent Ross Brothers Construction and the New Contract*

Sometime on or about June 8, 1992, Prater sent both Ross Brothers and Huntington Piping copies of the new contract (G.C. Exh. 8) containing the new wage rates. As noted hereafter, Respondent Huntington Piping paid the new wage rates for a 2-week period after June 1, 1992, the effective date of the new agreement. This matter will be dealt with separately.

Sometime after June 1, 1992, Local 577 members working for Ross Brothers Construction told Business Agent Prater that they were being paid at the wage rate under the old agreement (G.C. Exh. 5) rather than the new contract wage rates (G.C. Exh. 8) (Tr. 133). Prater then telephoned Ross Brothers' president, Morris Griffiths. When Prater asked him if he was going to pay the wages under the new agreement, Griffiths told them that he would not and that he would have nothing to do with the new agreement (Tr. 135–136).[8]

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[7] The Southeastern Association (not the Southern Ohio Mechanical Contractors Assn., which was the employer group executing G.C. Exh. 5 was composed of six business enterprises, the ownership of four of which was lodged in essentially two individuals, Daryl Stapleton and Bobby Evans. The employers who signed the expired contract on behalf of the Southern Ohio Mechanical contractor Association, as distinguished from the Southeastern Ohio Association, were Jack Stapleton, the deceased father of Daryl Stapleton, and Bobby Evans. Daryl Stapleton and Bobby Evans had membership cards in Local 577. If they abandoned the contracting business or worked less than 50 percent as contractors they could be referred out by Local 577 as journeymen plumbers from the bottom of the eligibility list.

[8] The new contract, aside from the substantial direct wage increase and the creation of the higher wage rate for industrial, as opposed

On June 8, 1992, Griffiths, on behalf of Respondent Ross Brothers, wrote to NIMA's grievance-adjustment arm, NMAPC, the National Maintenance Agreement Policy Committee, protesting, in particular, the wage increase included in Local 577's collective-bargaining agreement with the Southeastern Contractors Association:

> Gentlemen:
>
> Ross Brothers Construction Company strenuously objects to the proposed wage increase requested by Local 577 U.A. of Portsmouth, Ohio which covers the subject site.
>
> Local 577 has not signed a contract with the Tri-State Contractors Association which has been the historical bargaining group with Local 577 over the last 15 to 20 years.
>
> We received in the mail this morning (6–8–92), a wage breakdown for contractors signatory to Local 577's agreement. To my knowledge none of the members of the Tri-State Contractor Association are signatory to this agreement.
>
> This proposed wage package represents an increase this year of $3.09, whereas all other local unions, 22 of which are members of the multi-craft bargaining unit and another 34 locals who have affiliation with the Tri-State Building Trades Council have agreed to approximately $1.50 plus the drug testing fee of .12 per hour for this coming year.
>
> It is interesting to note that in the proposed wage increase for this year for the Local proposed Commercial agreement calls for a wage rate of 2.12 less than the Industrial rate.
>
> It is not a coincidence that applying the 90% modifier to the proposed industrial rate results in the approximate amount of the proposed commercial rate. It has been quoted to our office by a local contractor in Portsmouth that the purpose of the 3.09 increase was to circumvent the effect of the NMAPC modifier. I would estimate that the vast majority of the work done by this Local is done under the NMAPC Agreement.
>
> All of the other local unions in the area, including two U.S. Locals 521 and 248 have agreed to a reasonable increase in order to preserve industrial work for the Building Trades. It does not seem correct or fair to the local construction industry for one local to feel that they are better than every one else and demand an exorbitant increase.
>
> In lieu of being able to roll back the proposed increase we would respectfully suggest that an 80% modifier be applied to this Local in order to obtain parity.
>
> The history of this situation is as follows: Approximately one year before the expiration of the local Multi-Craft Agreement (5–31–92) the Contractors Association entered into negotiations to extend the agreements to 3 years beyond the expiration date of May 31, 1992. Committees from labor and management were established to try to accomplish the extension and implement a drug testing program. Phil Prater, Local 577 agent was a very outspoken member of the labor committee and was a leader in the negotiation. Apparently, after several months negotiations & the agreement was being finalized, Mr. Prater did not like what was negotiated and decided to withdraw and negotiate with three Portsmouth, Ohio Contractors (2 plumbers and a fabricator) all of whom to our knowledge are members of Local 577. The resultant agreement is the outcome of those negotiations and not as a result of the traditional bargaining group. Whether or not labor law was violated in this situation remains to be seen.
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> As it stands, all other locals have agreed to approximately 1.50, 1.00 and 1.00 over the next three years while the proposed Local 577 Agreement reflects 3.09, 1.25 and 1.25.
>
> We would appreciate your doing whatever is possible to bring this local in line with the remainder of the Building Trades crafts in the area.
>
> At present, we are paying the old rate and will do so until advised differently by the committee.

On July 7, 1992, Ross Brothers wrote directly to Local 577 regarding Local 577's obligation under the NIMA Agreement and that Ross Brothers had already protested the terms of Local 577's new contract under NIMA, the protest having been referred to the NMAPC Committee for resolution (G.C. Exh. 10):

> Your letter of July 3 was received this date July 7, 1992. Our comments are as follows:
>
> 1. We are working under an NMAPC Agreement at the Haverhill, Ohio.
>
> 2. Any and all disputes as to the administration of this contract are under the jurisdiction of the NMAPC.
>
> 3. Your blatant attempt to discriminate against industrial contractors and users has been referred to the NMAPC for resolution.
>
> 4. Pipefitters labor for this site is supplied by your local to this site under the terms of the National Maintenance Agreement and not a local agreement.
>
> 5. Any slowdown or work stoppage on this project would be a violation of the National Maintenance Agreement, particularly when the subject has been referred to the committee for resolution.
>
> 6. It is also our understanding that if certain craft labor is withheld from the jobsite, work may proceed with the crafts that are on the jobsite.
>
> Your continued opinion that you are better than all other crafts in the area can only cause dissension and will work to the detriment of the Building Trades construction industry.

At no time after Local 577's notice of withdrawal of bargaining rights from the Tri-State Council did Tri-State Building Contractors or Respondents request Local 577 to terminate or modify Respondents' NIMA obligation to pay the wage rates established by Local 577 in the new contract. Nor did Local 577 agree with the Respondents to permit their

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to commercial, plumbing work, also changed the method of calculating fringe benefits. The new contract required payment of fringe benefits for hours paid rather than hours worked, thus requiring payment of benefits at a time-and-a-half rate rather than a straight time rate for hours worked over 8 hours per day (Tr. 137). There were also changes in the apprenticeship ratio, travel pay, and the obligation to supply tools (Tr. 137).

paying pre-June 1, 1992 wage rates to Local 577 members or unit employees. Moreover it was stipulated that the Respondents, except Huntington Piping for a 2-week period, continue to pay the wage and benefit rates specified in the expired contract on NIMA-obligated projects (G.C. Exh. 5) at all times through the date of the hearing.

Furthermore, there is no dispute that foreign plumbing contractors working in Local 577's jurisdiction, under established procedure, regularly contacted the International Union (UA) and requested the extension of the coverage of the NIMA contract to particular jobsites therein. The International Union, according to this procedure, then notified the contractor that the job was in Local 577's jurisdiction in southern Ohio and that the foreign contractor was obligated to contact Business Manager Phillip Prater. In the period June 1, 1992, through May 1993, approximately 30 to 35 ''foreign contractors'' coming into Local 577's jurisdiction submitted to the terms of and signed the new contract (G.C. Exh. 8). There have been no wage rate changes allowed to them nor were there negotiations for different rates. Respondents concede that, as to these ''foreign'' contractors, the Local 577 new contract with the Southeastern Contractors Association is valid (Tr. 175–177). Lastly, Respondents concede that they ordinarily pay local plumbing union contract wage and benefit rates in other jurisdictions in which they work where the job is under the NIMA Agreement (Tr. 318). In such situations, the Respondents may not have participated in negotiations leading to the local contract.

In any event, 1 week after Respondent Ross Brothers vigorously complained to the National Maintenance Agreement Policy Committee (NMAPC), established by the NIMA Agreement, concerning the wage increases and other terms and conditions of the new Local 577 contract (G.C. Exh. 9), Business Manager Prater, on June 15, 1992, similarly complained (G.C. Exh. 13) of Ross Brothers' refusal to abide by its NIMA obligation: to pay, on NIMA-covered jobs, the wages specified in the Local 577 contract as required by the wage-obligation section (Art. VIII—Wages) in the NIMA contract (G.C. Exh. 4). Actually, Business Agent Prater addressed a letter to the International Union's president requesting that the International Union (the actual party to the NIMA grievance-adjustment committee, NMAPC) bring the matter of Ross Brothers' refusal to pay the new contract wage rate before the NMAPC committee. In so doing, Prater specifically requested ''assistance on this grievance, step IV of the National Maintenance Agreement Policy Committee'' NMAPC has formally acted upon neither Ross Brothers' June 8, 1992 complaint against Local 577 (G.C. Exh. 9) or Local 577's June 15 complaint (G.C. Exh. 13) to its International Union to present the Ross Brothers alleged default to the committee.[9]

[9] Over Respondents' objection, I admitted in evidence a July 10, 1992 inter office memorandum, on stationery of the International Union (UA) (G.C. Exh. 14), a copy of which was sent to Local 577. This memorandum, from the International Union's representative on the NMAPC committee to another International Union representative, referred to a meeting of the NMAPC labor section on July 1, 1992, regarding Local 577's recent contract including the wage increase. The text of the memorandum is:

> The Labor Section discussed Local 577's newly negotiated wage package effective June 1, 1992 with a $3.09 wage increase in the first year. After much discussion it was agreed that no action could be taken by the N.M.A.P.C. as it was not within our power to rule on, or get involved in local collective-bargaining negotiations.

As I noted at the hearing, I regard this interoffice memorandum as hearsay; not binding on Respondents and certainly not an official act of the NMAPC which would be a dispositive action of that organization binding Respondent Ross Brothers.

E. *Respondent Huntington Piping, Inc.*

While Ross Brothers' main office is in Kentucky, Huntington Piping works out of Huntington, West Virginia. Both Respondents are industrial contractors in Ohio, Kentucky, and West Virginia. They are competitors.

In June 1992, while working on a job for Dow Chemical Company, Huntington Piping paid the higher wage rates under the new contract for a period of 2 weeks. Dow Chemical then advised Huntington Piping that it would not reimburse Huntington for the higher wage rates. At that point, Huntington Piping returned to paying the old rate and wrote several letters to Local 577 (G.C. Exhs. 11 and 12). These letters, in substance, requested that Local 577 enter into negotiations for a new contract. Business Manager Prater never directly refused to negotiate a new contract with Huntington Piping; rather, Local 577 sent monthly letters insisting that Huntington Piping continually made mistakes on computation of the rate of fringe benefits. On each such occasion, Huntington Piping declared that it was trying to negotiate a new contract. Like Ross Brothers, Huntington Piping continues to pay its plumbing employees at the ''old rate'' in the expired contract (G.C. Exh. 5) rather than the rates under the new contract (G.C. Exh. 8).

Like Ross Brothers, NMAPC has never contacted Huntington Piping regarding the June 15, 1992 grievance filed by Prater regarding the failure of contractors to pay the rates established in the new contract.

Discussion and Conclusions

The prima facie case with regard to both Respondents

Respondents concede that not only are they bound by the NIMA Agreement (Tr. 55–58) but that they would pay the new wage rates established in the new contract (G.C. Exh. 8) if directed to do so by NMAPC. Neither Respondent is a signatory of Local 577's new contract.

Articles VIII—Wages in the NIMA Agreement (G.C. Exh. 4), as above noted, provides:

> Wage rates shall be those as set forth in the current Labor Agreement of the affiliated Local Union where such work is to be performed and shall be paid to all employees under the terms of this agreement unless otherwise modified by the National Maintenance Agreements Policy Committee Inc.

Both Respondents had failed and refused to pay those wage rates notwithstanding their concession that they are bound by the NIMA contract including the provision with regard to wages.

Under the long-established Board Rule set forth in *Oak Cliff-Golman Baking Co*., 207 NLRB 1063, enfd. 505 F.2d 1302, cert. denied 423 U.S. 826; *Fort Pierce Jai-Alai*, 310 NLRB 862 (1993), an employer, notwithstanding that he is faced with a dire financial crisis which would close his oper-

ations, may not refuse to pay the wage rates established in a valid collective-bargaining contract. In rejecting the employer's defense that its action in unilaterally reducing the wages in the face of dire economic consequences, at most, was a breach of contract to be remedied by the courts, the Board held that:

> . . . clear repudiation of the contract wage provision is not just a mere breach of the contract, but amounts, as a technical matter to the striking of a death blow to the contract as a whole, and is thus, in reality a basic repudiation of the bargaining relationship.

The Board observed that, under the unambiguous language of Section 8(d) of the Act, explicitly forbidding midterm modification of a contract's wage provision without the consent of the union, the employer's good-faith motivation in seeking to preserve its own existence was irrelevant.

Furthermore, relevant to the instant case, the Board rejected the Employer's plea that the alleged violation be deferred to the contractual grievance-arbitration procedure because the Union had invoked that procedure before it filed the charge. In that case, then Chairman Miller refused to defer under *Collyer Insulated Wire*, 192 NLRB 837 (1971), because deferral was inappropriate absent a claim or finding that *any* of the contract terms even *arguably* authorized the employer's unilateral refusal to pay the contract wage rates.[10]

Under these conditions, with Respondents admittedly being bound by the NIMA obligation to pay the wage rates established in the Local Union's collective-bargaining agreement, I conclude that there was a prima facie case of repudiation of the NIMA contract obligation to pay the Local 577 wage rate (incorporated in the NIMA contract art. VIII—Wages) on any job on which Respondents were granted NIMA contract coverage; and that such failures to pay the wage rates under the new contract (G.C. Exh. 8) come squarely within the violation of Section 8(a)(5) established in *Oak Cliff-Golman Baking Co*., supra, i.e., a repudiation of the contract wage provision constitutes a repudiation of the collective-bargaining relationship. I conclude, therefore, that as a prima facie matter, Respondents thereby violated Sections 8(d) and 8(a)(5) and (1) of the Act as alleged. It is no defense that Respondents stand willing to bargain with Local 577 on the wage and benefit rates. *Fort Pierce Jai-Alai*, supra.

The Defenses

Ross Brothers' defenses

The pleadings, and Ross Brothers' position at the hearing, demonstrates that Respondent Ross Brothers advances two basic defenses to the prima facie case:

(1) That the contract between Local 577 and the Southeastern Ohio Contractors; Association is *invalid* because (a) it was not bargained in good faith or at arms' length with the Southeastern Contractors Association; and (b) in any event, Local 577 is bound by the multicraft contract extended by the Tri-State Building Contractors and the Tri-State Building Trades Council in August 1992 for a 3-year period. This result is based upon the long bargaining history of Local 577 through the Tri-State Building and Construction Trades Council and its continuing bargaining with and through that organization as late as the March and April 1991 bargaining for the preexpiration extension of the existing contract (G.C. Exh. 5).

(2) Further, Respondent Ross Brothers urges that both its own June 8, 1992 complaint or grievance and the Union's June 15 grievance, both to NIMA, both concerning Ross Brothers' *obligation* to observe the new Local 577 wage rates, are still pending before NMAPC, and that since NMAPC has not acted in the matter, a finding of *repudiation* by Ross Brothers is premature. Thus, it is argued, that no 8(a)(5) violation may be perfected under the theory of Ross Brothers' repudiation of its NIMA obligation to pay the new wage rates until the obligation is established through NMAPC action denying Ross Brothers' grievance and/or granting Local 577's grievance. Cf. *Dubo Mfg. Co*., 142 NLRB 431, 432 (1963).

With regard to the first discernible defense, that the new contract was not negotiated in good faith or at arm's length, Respondents observed that the number of employees employed by the six contractor-members of the Southeastern Association is small; that there are only really four principals acting under the mask of six contractors; that certain of the contractors are not exclusively engaged, like Ross Brothers, in industrial plumbing but are installers of commercial plumbing; that the principal negotiators of the new contract on behalf of the Southeastern Contractors' Association hold membership cards in Local 577; and that such contractors who are members of Local 577 may be referred out as journeymen plumbers if they find that such work is to their financial advantage.

There has been no evidence adduced that any of these six contracting organizations or their four principals are not engaged, in large part, in industrial plumbing contracting. The fact that some or all of them are also engaged in the installation of commercial type plumbing does not seem dispositive. Respondents are not engaged in commercial plumbing and are therefore free of the commercial rates. The NIMA Agreement specifies coverage of those employers, like Respondents, engaged in construction work, maintenance, repair, and renovation of industrial facilities (G.C. Exh. 4, p. 1). Similarly, nothing in the NIMA Agreement (or the statute) suggests that the size of the contractor or the number of employees he employs on particular jobs governs his eligibility to contract with Local 577 in establishing a lawful local wage rate. Nor is there any suggestion or proof in this record that the contractors' retention of Local 577 membership cards is of disabling significance. The only evidence of record regarding their ability to work as journeymen plumbers is that if they abandon or severely limit their contracting function, they be referred out from the bottom of the Local 577 eligibility list. It is not a statutory violation, nor here a contract violation, for member-contractor to sign a collective-bargaining agreement with the union.[11]

There is no evidence in this record to suggest any discriminatory motive, discriminatory application of the new contract (G.C. Exh. 8), or conflict of interest. More than 30 contractors have signed the new agreement and Respondents

[10] The other two members of the Board would refuse to defer because of their general disagreement with the *Collyer* deferral doctrine, *Oak Cliff-Golman Baking Co*., supra at 1063.

[11] *Sheet Metal Workers Local 104 (Brisco Sheet Metal)*, 311 NLRB 99 (1993).

concede that ''foreign'' contractors have signed the new agreement and that foreign contractors working in the area would be bound by that agreement. There is no evidence of a lack of arm's-length relationship or any suggestion that the wage rates or other terms or conditions of employment specified in the new contract would be discriminatorily applied against either of the Respondents. The speed of execution and prior negotiations leading to the new contract does not constitute evidence of bad faith, discrimination, or overreaching.

Ross Brothers' most particular complaint, obvious on the record, is that the wage rates and benefits are too costly and will inhibit the business of construction and repair of plumbing facilities in the Tri-State area. I conclude, nevertheless, that there is no showing of a lack of bona fides in the negotiation and execution of the new contract. Ross Brothers' concern for the inhibitory effect of the higher wage rates may be justified. It is, however, no defense to Respondents' conduct. *Oak Cliff-Golman Baking Co*., supra.

Respondent Ross Brothers' second defense is that Local 577, through Business Manager Prater, is bound by the Building Trades Council's multicraft agreement of August 1991 extending the Tri-State agreement for 3 years. This allegedly results from Prater's participation in the Building Trades Council's March and April 1991 bargaining with Building Contractors which led to the August 1991 extension; the history of Local 577 bargaining through the multicraft Building Trades Council; and Local 577's failure to withdraw bargaining rights from the Building Trades Council until March 1992.

The Charging Party, in particular, opposes this defense on the ground that the timeliness of the withdrawal should be measured by the expiration of the preexisting contract (G.C. Exh. 5, May 31, 1992 expiration) and not by the participation of Local 577 in negotiations concerning a reopener (compare Tr. 295 with 296–297).

I find, however, that this defense in any event must be rejected. With regard to the timeliness of Local 577's withdrawal of bargaining rights from the Building Trades Council, and the consequences of its participation in such reopener-bargaining in March and April 1991 those matters are disposed of by referring to the explicit agreement of the parties. The parties agreed according to the testimony of both Prater and Ross Brothers' president, Griffiths, that the bargaining on the reopener of the existing contract was on the explicit condition that any party participating in the March and April 1991 bargaining was free of any obligation to continue bargaining and had the option of merely ''dropping out'' of the negotiations upon notice thereof. There was no requirement that the notice be written.

The evidence in this record, based upon Prater's uncontradicted and credited testimony, is that following Local 577's May 1991 rejection of the terms offered by Tri-State Building Contractors, Prater informed Tri-State Building Contractors in June 1991 that Local 577 was withdrawing from multicraft bargaining through the Building Trades Council, but would comply with the terms of the existing contract until expiration on May 31, 1992, some 11 months thereafter (Tr. 491). Indeed, in order to emphasize its June 1991 notification of a withdrawal of bargaining rights during these reopener negotiations, Local 577 agreed to accept only the remaining 50-cent-per-hour increase in wage rates applicable to the final year of the expiring contract and refused to accept an additional 50-cent-per-hour wage increase offered by the Building Contractors Association to Local Unions denoting continued participation in bargaining and acceptance of the 3-year extension under the reopened negotiations (Tr. 295–297).[12]

Insofar as the timeliness and unequivocal nature of withdrawal from bargaining through the Building Trades Council are concerned, all that *Retail Associates*, 120 NLRB 388, requires is that the withdrawal be timely and unequivocal. In the instant case, the parties were not concerned, in March and April 1991, with the expiration of the contract on May 31, 1992, more than 14 months thereafter. I find that Prater's June 1991 *oral* notification of both the Tri-State Building Trades and the Tri-State Building Contractors Association that Local 577 would not renew its bargaining through the Building Trades Council, would withdraw from such bargaining, and would not agree to the terms of the new contract, together with the subsequent March 4, 1992 60-day written notification (pursuant to the terms of the existing contract) of withdrawal of bargaining rights (G.C. Exh. 6) constitute the timely and unequivocal notification of withdrawal of bargaining rights and nonparticipation as required by the *Retail Associate's* rule, supra.[13]

On the other hand, Local 577 not only withdrew bargaining rights from the multicraft Building Trades Council, but ceased bargaining through it, or by single bargaining, with the Tri-State Building Contractors Association and then ceased recognizing the Contractors Association. Nothing in this record, however, demonstrates that the Building Contractors Association was the employer with whom Local 577 was *obligated* to bargain. Nor, certainly for reopener purposes, were Respondents obligated to continue bargaining with the Building Trades Council. It was the International Union that was the statutory labor organization recognized by Respondents as the collective-bargaining agent to whom they were obligated under NIMA-covered projects. Multicraft bargaining in which Local 577 and Respondents engaged through their respective multiunion, multiemployer agencies, for purposes of the NIMA Agreement, was merely a convenient bargaining device through which wages and benefits could be determined. Such bargaining was hardly the only mechanism for determining wages. Such bargaining, being consensual, was subject to rearrangement and change under *Retail Associates*, supra. We are here dealing only with the question whether Local 577 lawfully established a local union wage rate for purposes of the NIMA Agreement, ''Article VIII-Wages.'' Assuming, arguendo, that there was any statutory obligation on Local 577 to bargain through the Building Trades Council, I conclude there was timely and

[12] The Charging Party observes that Respondents never urged, as a defense, that Local 577 was bound by the August 1991 3-year extension until this hearing.

[13] See *S. Freedman Electric*, 256 NLRB 432 fn. 2 (1981), enfd. mem. 679 F.2d 873 (2d Cir. 1981). Any requirement that the notice be *written* is fulfilled by Local 577's timely written 60-day notice (G.C. Exh. 6) of formal withdrawal from bargaining through the multicraft Building Trades Council sent to both the Building Trades Council and the Building Contractors Association, prior to May 31, 1992 contract expiration. The *oral* notification of June 1991 satisfies the agreement and practice of the parties where bargaining relates merely to premature extension during reopened bargaining.

unequivocal *Retail Associates* withdrawal by Local 577 from the Building Trades Council.

There remains, however, the question whether Local 577 was under a statutory obligation to thereafter recognize and bargain on a single basis with the Tri-State Building Contractors' Association. I conclude that Local 577's March 4, 1992 written notification to the Tri-State Biding Contractor's Association (G.C. Exh. 6) meets the requirements concerning withdrawal of recognition imposed by *John Deklewa & Sons*, 282 NLRB 1375, enfd. sub. nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). The Board Rule, with regard to termination of the obligation to recognize and bargain with an employer in the construction industry under an 8(f) contract[14] is that, upon expiration of the agreement, not only does the signatory union enjoy no presumption of majority status, but either party may repudiate the 8(f) bargaining relationship and withdraw recognition from the other party absent demonstration of majority status by the union prior to the time of repudiation, or through voluntary recognition. The Union, like Respondents, similarly would be free to repudiate the 8(f) contract and repudiate the bargaining relationship, if any. No evidence demonstrating voluntary recognition or majority status was adduced. I therefore conclude that Local 577, through its written notification to the Building Contractors Association on March 4, 1992, not only freed itself from the terms of any succeeding contract, but lawfully repudiated the bargaining relationship, if any, with the Tri-State Building Contractors Association.

Respondents Ross Brothers' Deferral Defenses

A. *Use of the NIMA Grievance Procedure*

Upon Respondent Ross Brothers refusal to pay its plumbers according to the new wage rates in the Southeastern Association contract (G.C. Exh. 8), and after Local 577, in early June 1992, served on Ross Brothers a copy of the wage rates in the new contract, and demanded compliance therewith, Ross Brothers, on June 8, 1992 immediately complained to NMAPC concerning (a) the size of the wage increase in the new contract; (b) Local 577's abandonment of multicraft negotiations and late withdrawal from bargaining with the traditional bargaining group (Building Contractors Assn.) apparently in violation of labor law; and (c) a request for NMAPC ''doing whatever is possible to bring this local [Local 577] in line with the remainder of the building trade crafts in this area. At present we are paying the old rate and will do so until advised differently by the committee'' (G.C. Exh. 9).

A week later, on June 15, 1992, Local 577 similarly petitioned its International Union, requesting its assistance ''on this grievance, step IV of The National Maintenance Agreements Policy Committee [concerning Ross Brothers Construction Co. refusal] to pay the wage increase effective June 1, 1992. This Local Union and The Southeastern Ohio Mechanical Contractors Association, having negotiated a 5-year agreement June 1, 1992 to May 31, 1997'' (G.C. Exh. 13). It is clear, therefore that both parties appealed under NIMA concerning the contractual right of NMAPC to enforce or set aside or modify the terms of the new contract (G.C. Exh. 8).

As above noted, there are two articles of the NIMA Agreement (G.C. Exh. 4) that are pertinent to the evaluation of this ''deferral'' defense: (1) In article VIII (wages), the NIMA Agreement obligates the employer to pay the wage rates ''as set forth in the current Labor Agreement of the affiliated Local Union where such work is to be performed . . . unless otherwise modified by [NMAPC].'' (2) On the other hand, by article VI (grievances), the grievance machinery of the NIMA agreement is apparently not available to contesting wage rates. Thus, as noted, the NIMA Agreement, inter alia, provides:

> Grievances, other than those pertaining to jurisdiction or *general wage rates* on any work covered by this agreement shall be handled in the following manner [emphasis added]:
>
> Step 1. . . . .
> Step 2. . . . .
> Step 3. . . . .
> Step 4. If the parties are unable to effect an amicable settlement of [sic] adjustment of any grievance or controversy, such grievance or controversy shall be submitted to [NMAPC] for a decision to become effective immediately.
>
> Step 5. Failure of [NMAPC] to reach a decision shall constitute a basis for a submittal of the question to the American Arbitration Association for a binding decision. . . . The affected parties to the arbitration shall equally share in the cost, including printing and publication of any record of such arbitration.
>
> The arbitrator shall only have jurisdiction and authority to interpret, apply or determine compliance with the provisions of this Agreement.

As will be seen hereafter, it is actually unnecessary to decide whether the parties, or either of them, have properly raised a ''grievance'' within the contractual framework of the NIMA Agreement or whether the complaints of the parties, even if not technically recognizable ''grievances,'' are or should be amenable to a deferral policy of the Board. For in either case, I conclude that, for similar policy reasons, there should be no deferral by the Board.

The first question, of course, is whether the grievance procedure in article VI of the NIMA Agreement is applicable at all. For it is only grievances ''other than those pertaining to jurisdiction or general wage rates'' which are susceptible to the NIMA contract grievance procedure. In turn, that raises the question whether ''general wage rates,''[15] excluded

[14] There is no question that, on this record, the Respondents are in the construction industry and that the intent of the parties was to enter into a contract (the NIMA Agreement) subject to the provisions of Sec. 8(f) of the National Labor Relations Act. The two Local 577 agreements (G.C. Exhs. 5 and 8) are also 8(f) agreements. Under *Deklewa*, supra, the Board presumes that parties in the construction industry intend their relationship to be an 8(f) relationship. Thus, the burden is on the party who seeks to show the contrary, i.e., a Sec. 9 relationship. *Casale Industries*, supra, 311 NLRB 951. There is not evidence rebutting the presumption.

[15] As noted, above, the grievance procedure also excludes grievances ''pertaining to jurisdiction.'' The NIMA Agreement, article I (recognition), recognizes that certain other jurisdictional dispute settlement procedures in the industry are not applicable to the work covered by the NIMA Agreement. By the terms of article I (recogni-

Continued

from the grievance procedure in article VI (grievances), is the same or the equivalent of ''wage rates'' (art. VIII—wages). Under the NIMA Agreement, the employer is obligated to pay the ''wage rates'' established in the current labor agreement of the Local Union. Although there might arguably be a difference between wage rates and general wage rates as used in the two articles, yet in the absence of evidence, even argument, to the contrary, I conclude that there is no difference.

The exclusion of general wage rates from the grievance procedure, along with grievances ''pertaining to jurisdiction,'' evidently derives from the desire by NIMA parties to avoid using the grievance procedure to second-guess the wage rates established by the Local Union. This exclusion, I conclude, avoids having NMAPC sit as an appellate tribunal hearing potentially endless grievances on allegedly unfair wage rates established by Local Unions with employers among whom the complaining contractor was not represented. Thus, the grievance procedure (art. VI), I conclude, is available neither to protect or enforce Local 577's wage rates notwithstanding that Local 577 explicitly attempted to invoke this NIMA grievance procedure (G.C. Exh. 13, June 15, 1992) because of Respondent Ross Brothers' refusal to pay the newly negotiated wage increase and notwithstanding that Respondent Ross Brothers presented the same matter generally to NMAPC when it ''strenuously objected to the proposed wage increase requested by Local 577'' (G.C. Exh. 9, June 8, 1992). I conclude that deferral be denied because the issue, having been clearly excluded, is not even arguably covered by the contract grievance procedure (and its arbitration provision). Cf. *The Developing Labor Law*, 1032 (3d ed.), and cases cited therein; *Oak-Cliff Golman Baking*, supra.

Furthermore, even if the wage rates were grievable, as the parties attempts suggested, I would conclude that the parties, particularly Respondent Ross Brothers, failed to comply with step 5 of the grievance procedure. Again, step 5 of the grievance procedure (G.C. Exh. 4, p. 5) provides that the failure of NMAPC to reach a decision ''shall constitute a basis for a submittal of the question to the American Arbitration Association for a binding decision.'' There can be no question that the parties' ''grievances'' were submitted no later than on or about June 8 and 15, respectively (G.C. Exhs. 9 and 13). Between June 1992, and at least through the date of the instant hearing ending May 20, 1993, there has been no disposition by NMAPC.[16] Thus I conclude, the failure of NMAPC to act in an 11-month period establishes the predicate, under step 5 of the grievance procedure, that there has been a *failure* of NMAPC to reach a decision. Such a *failure* constitutes the basis for submittal of the question to the American Arbitration Association for a binding decision. There has been no such submission to the American Arbitration Association on the record made before me.

The final question, assuming arguendo, that the grievance procedure is applicable at all, is upon whom to cast the burden of proceeding to the American Arbitration Association pursuant to step 5. Since I reach a similar conclusion, below, in the discussion, where it is assumed that the formal grievance procedure does not apply, I shall refer to the reasoning in that discussion in disposing of the instant issue: on whom to place the procedural burden of submission to the American Arbitration Association. In short, I place the burden on Respondent Ross Brothers rather than on the Union for the reasons outlined below.

B. *Deferral in the Absence of a Grievance Procedure Ending in Arbitration*

As above noted, the Board generally does not defer resolution of an issue where the disposition is not covered by the contract through an arbitration provision. *The Developing Labor Law*, at page 1032 fn. 132, and cases cited therein.

In the instant case, however, the parties agreed to a limitation on the explicit NIMA obligation that the employer pay the wage rate set forth in the Local Union's current labor agreement for work performed in the Local Union's jurisdiction. That obligation exists ''unless otherwise modified by [NMAPC].''

There is, however, no evident NIMA procedure for the invocation of a modification (by NMAPC) of Local Union wage rates under article VIII. It is also arguable that Ross Brothers' protest over the high wage rate is not a dispute arising over the application or interpretation of an existing collective-bargaining agreement, but merely a protest of the high wage rate, a defense rejected in *Oak-Cliff Golman Baking Co*., 207 NLRB at 1064. Yet, it is clearly arguable that, unlike the facts and conclusions in *Oak-Cliff Golman*, there is room here for a finding that the article VIII wage rate terms authorize a protest or appeal by Ross Brothers to have NMAPC modify Local 577's wage rates. Thus, unlike *Oak-Cliff Golman* where there was repudiation of the agreement in violation of Section 8(d) and Section 8(a)(5) of the Act, in the instant case, Ross Brothers agreed to be bound by the NMAPC decision and invoked the contract provision permitting modification by NMAPC of the Local 577 wage rate. Additionally, unlike *Oak-Cliff Golman*, where there was no contract provision which could remotely authorize the employer's refusal to pay the contract wage rate, here the NIMA Agreement specifically authorizes an appeal to NMAPC to ''modify'' the obligation to pay the local wage rate. In addition, Local 577 also involved NMAPC's help albeit in attempting to clothe the request as a ''grievance.'' I believe, therefore, that Ross Brothers may arguably take the position that its June 8, 1992 protest to NMAPC (G.C. Exh. 9) is consistent with one of the Board's underlying supports in the rationale of both *Dubo Mfg. Co*., 142 NLRB 431 (1963), and *United Technologies Corp*., 268 NLRB 557, 558 (1984). In those cases, the Board implemented or expanded its deferral policy and relied, in pertinent part, on congressional intent as manifested in Section 203(d), 29 U.S.C. § 173(d) (1976). The Board, quoting from the Act, supported:

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tion), jurisdictional disputes under *this* contract are referred to the respective general presidents of the Unions for resolution with representives of the employer who awarded the work permitted to participate. Ultimate resolution is by an impartial third party.

[16] As above noted, in light of Respondents' objection, I have made no use of the International Union's interoffice memorandum (G.C. Exh. 14) of July 10, 1992, wherein NMAPC apparently agreed that ''no action could be taken by [NMAPC] as it was not within our power to rule on, or get involved in local collective-bargaining negotiations.'' Whatever else, the substance is hearsay and although there was no question raised as to the authenticity of the memorandum, it was never served on Respondents and there was no technical demonstration of authenticity.

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

It is arguable that, whatever else Ross Brothers' June 8, 1992 complaint relates to, it is not the ''application or interpretation'' of the new contract; rather it is specifically a protest of its high wage rate and, as an afterthought, Local 577's abandoning both its multicraft bargaining agency (Building and Construction Trades Council) and its collective-bargaining partner (Tri-State Building Contractors Association). Yet, since the thrust of Ross Brothers' protest is the wage rate, since the wage rate, *by the agreement of the parties*, is subject to modification by NMAPC, and since both parties presented the issue to NMAPC, it seems to me consistent with the congressional intent that the Board might well entertain deferral based upon the language of article VIII (wages) and the essential thrust of Ross Brothers' June 8 protest to NMAPC concerning the high wage rates (G.C. Exh. 9). *Dubo Mfg. Co*., supra.

Assuming, therefore, all elements favorable to deferral in favor of Ross Brothers' position, I would nevertheless recommend to the Board that it not defer on these facts. For, as in the case of the arguendo existence of a contractual grievance under the NIMA Agreement, supra, Respondent Ross Brothers here has rested on its oars for 11 months following submission of its protest against the Local 577 new wage structure (G.C. Exh. 8). Ross Brothers is apparently content with NMAPC's inaction in the disposition of its June 8, 1992 protest. There has been 11 months of NIMA inaction and 11 months of Ross Brothers failing to pursue the matter. I recommend that the Board not defer to this contractual process regardless of the omission of a contractual grievance procedure relating thereto. I conclude that Respondent Ross Brothers inaction for a period of 11 months militates against Board deferral.[17] I do not cast the burden on the Union of prodding NMAPC to dispose of the issue because the NIMA Agreement (art. VIII—wages) obligates the employer to pay the wage rates in the local agreement ''unless otherwise modified by [NIMA].'' The Union has the benefit of the language as it exists. I conclude that the contract language places the burden of proceeding, and continuing to proceed, upon Respondent Ross Brothers since it is the party attempting to escape from an existing obligation of the NIMA Agreement to which it admits that it is bound. I would recommend to the Board deferral not be granted under the instant facts because the party seeking Board deferral is not acting with diligence in securing the exceptional rights it seeks pursuant to the contract on which it depends. In such a situation, deferral, with its attendant further delay, would only exacerbate what appears to be Ross Brothers' attempt, in substance, to escape from the financial terms of an otherwise lawful collective-bargaining agreement by a policy of inaction. Whatever other result flows therefrom, I cannot recommend to the Board that, exercising its discretion, it permit Respondent Ross Brothers to invoke that discretion thereby further delaying its contract obligation.

Thus, as above noted, I conclude that whether or not Respondent Ross Brothers' protest (G.C. Exh. 9) to NMAPC constitutes a contractual grievance pursuant to article VI of the NIMA Agreement or, nevertheless, constitutes a protest cognizable under the contract which would otherwise invoke the Board's deferral doctrine, I conclude that Ross Brothers' inaction militates against invoking the Board's deferral policy. In either case, I reach this result because Respondent Ross Brothers (a) failed to submit its protest to the American Arbitration Association following NMAPC's failure to reach a decision (step 5, art. VI—grievances); or (b) because Respondent Ross Brothers, even if it is not in possession of a contractual grievance, failed to diligently pursue its rights under the contractual method supplied in article VIII—wages, for modification of the Local 577 wage rate by NMAPC. I therefore conclude that, in any event, there be no deferral of the Board processes and that the defense of deferral or mere breach of contract be rejected.

It is therefore my ultimate conclusion that Respondents' defenses, as above analyzed, do not meet the burden of rebutting the prima facie case of a violation of Section 8(d) and Section 8(a)(5) and (1) of the Act, *Oak-Cliff Golman Baking Co*., 202 NLRB 614, 617 (1973).

The Violations with Respect to Huntington Piping, Inc.

Sam Hood, owner and president of Respondent Huntington Piping, is a member of the Tri-State Building Contractors Association and therefore, like Respondent Ross Brothers, is chargeable with notice of the April 8, 1992 communication from its bargaining agent, Tri-State Building Contractors to Local 577 protesting the $3.09-per-hour wage increase. Hood nevertheless testified that, around June 8 or 9, 1992, he first learned of the new wage rate upon receiving a one-sheet letter from Local 577 designating the new rates. At that time, he was engaged on a job with Dow Chemical Company in Ohio. For a 2-week period he paid his Local 577 plumbers at the new rates established by Local 577 (G.C. Exh. 8) until the matter of reimbursement could be cleared up with Dow Chemical. After paying the higher rate for 2 weeks, Dow Chemical told Huntington Piping that it would not reimburse Huntington Piping for the higher rate. Huntington Piping then refused to pay its Local 577 plumbers at the higher rate and wrote of its dissatisfaction to Local 577 in June 1992 (G.C. Exh. 11; G.C. Exh. 12). In letters of June 12 and 24, 1992, Huntington Piping expressed ''shock'' at the $3.09 increase; told of their customers' displeasure with that wage increase; and notified Local 577 that Huntington Piping would not accept the terms of the new contract and wished to negotiate a new contract with Local 577 covering wages. Having received no response from Local 577, Huntington Piping, on June 24, notified Local 577 that henceforth all wages and fringe benefits would be paid at the contract rates of the expired contract to which it was a party (G.C. Exh. 5).

In a letter of August 14, 1992 (G.C. Exh. 15), Huntington Piping noted that the International Union had denied to it the extension of the NIMA Agreement to cover its Allied Signal Corporation project in Ironton, Ohio. At a prejob conference of August 4, 1992, Local 577 had insisted that the piping work on that project was within its jurisdiction and that it expected that the work be assigned to its pipefitters. Again

[17] Under *Collyer Insulated Wire*, supra, 192 NLRB 837, *Dubo*, supra, and *United Technologies Corp*., supra, the Board's deferral is an exercise of its discretion.

noting the denial of the extension of the NIMA contract by the International Union to cover the job and Local 577's insistence on manning the project, Respondent Huntington Piping said that assignments would be made to Local 577 pipefitters but would be made under terms and conditions ''identical to the [NIMA] agreement'' although no formal NIMA Agreement existed on the project with the pipefitters. It insisted on paying the pipefitters pursuant to the terms of the expired collective-bargaining agreement (G.C. Exh. 5) until a further collective-bargaining agreement was negotiated between it and Local 577 (G.C. Exh. 15).

Although the record is not clear on the point, it appears that Huntington Piping agreed to be bound by the provisions of the collective-bargaining agreement, and successor agreements, between Local 577 and the Southern Ohio Mechanical Contractors Association (G.C. Exh. 5) on or about May 27, 1986 (C.P. Exh. 3).

On August 17, 1992, the International Union (UA) wrote to Huntington Piping:

> Dear Mr. Hood:
>
> This will supersede our communications of July 2 and July 8, 1992 denying your request for the National Industrial Maintenance Agreement to cover work at Allied-Signal Corporation, Ironton Facility–Ironton, Ohio, which is located in the jurisdiction of United Association Local Union No. 577 of Portsmouth, Ohio.
>
> Please be advised that we have reconsidered your request to extend this Agreement and it has now been approved and may be placed into effect at the above named location. Please be advised that Local Union 577's 100% wage rate is $21.72 per hour, plus fringes. Please note that this site is approved at 90% wages, which equals $19.55 per hour, and 100% fringes.
>
> It is understood and agreed to by your signature to the National Industrial Maintenance Agreement that you will forward quarterly man-hour reports to Mr. Noel C. Borck, Impartial Secretary of the National Maintenance Agreements Policy Committee, Inc. Mr. Borck's office will forward your company the necessary reporting forms.

On August 21, 1992, Huntington Piping promptly responded to the International Union (UA) regarding the above August 17 letter which extended the NIMA Agreement to the Allied-Signal Corporation project under the jurisdiction of Local 577. In Huntington Piping's August 21 reply it acknowledges the extension of the NIMA Agreement to the Allied-Signal project but notes:

> We are in receipt of your letter of August 17, 1992, whereas the U.A. has apparently ignored our letter of August 14, 1992 (copy enclosed) and upon reconsideration has agreed to extend the National Maintenance Agreement to cover work at our Allied-Signal project in Ironton, Ohio.
>
> Our position is that the U.A. denied our request for an extension and we have assigned the work to Local Union 577 under an implied agreement identical to the terms, conditions and provisions of the National Maintenance Agreement.
>
> Furthermore, in response to the second paragraph of your letter, Huntington Piping, Inc. has no current contract with Local Union 577 and the wage rate to which you refer is purportedly a rate which applies to a contract which Local Union 577 has entered with a contractors association in another area, specializing in non-industrial work, of which Huntington Piping, Inc. is not affiliated.

At all times since Respondent Huntington Piping's discontinuance, after 2 weeks, of paying the plumbers working in Local 577's jurisdiction according to the terms of the new contract between Local 577 and the Southeastern Contractors Association (G.C. Exh. 8), it has refused to contribute to Local 577's various fringe benefit funds according to the higher rates prescribed in the new contract. It has insisted on contributing to those funds according to the lower rates contained in the contract which expired on May 31, 1992, to which it was a party (G.C. Exh. 5). Periodic letters from Local 577 and its fund manager alleging the existence of shortages in fringe benefit contributions were met by Respondent Huntington Piping refusing to pay such additional moneys pursuant to the new contract (G.C. Exh. 8), alleging that it was neither a signatory of any contract with Local 577 nor a member of the Southeastern Contractors Association, and was contributing to the Local 577 benefit funds according to the rates in the expired contract (G.C. Exh. 5).

Discussion and Conclusions

Unlike the situation concerning Respondent Ross Brothers, Respondent Huntington Piping did not file a grievance requesting NMAPC to modify the wage and fringe benefit rates established by Local 577 and the Southeastern Mechanical Contractors Association in the new contract (G.C. Exh. 8). Rather, Huntington Piping's exclusive defense, on this record, appears to be that since it is not a party to any agreement with Local 577 and was not represented by Southeastern Contractors Association in the new contract, it is not bound by its terms. That defense, it seems to me, is an irrelevancy.

The dispositive issue is not whether Respondent Huntington Piping has a separate collective-bargaining obligation running to Local 577. Rather, it is whether Respondent Huntington Piping, at all material times, has been, and is, bound by the NIMA Agreement. That issue, I have found, above, has been settled by Respondents' concession on the record. Therefore, since Respondent Huntington Piping (as well as Respondent Ross Brothers) has been, and is, bound by the NIMA Agreement, it is bound by the NIMA requirement that work performed under the NIMA Agreement be paid pursuant to the wage rate established in the Local Union's agreement for work performed in the Local Union's jurisdiction. In the instant case, the International Union, somewhat belatedly, extended NIMA coverage to Respondent Huntington Piping on the Allied-Signal job. In fact, Respondent Huntington Piping *requested* such coverage which was finally granted to Respondent Huntington Piping by virtue of the International Union's August 17, 1992 letter (C.P. Exh. 2).

In short, therefore, where Respondents are bound by the NIMA Agreement and NIMA coverage is then granted to particular jobs in the Local 577 jurisdictional area, Respondents, on this record, like all other NIMA-bound contractors, are bound by the NIMA Agreement regardless whether they have any separate contractual relationship to Local 577.

Since Respondents are bound by the NIMA Agreement and since the NIMA Agreement requires payment of both fringes and wages pursuant to the outstanding Local 577 agreement, Respondent Huntington Piping is bound by its NIMA obligation regardless of, and in spite of, any failure to have a separate contractual relationship with Local 577.

I conclude, therefore, that Respondent Huntington Piping, in failing and refusing to be bound by the wage rates and fringe benefit rates in the existing Local 577 collective-bargaining agreement (G.C. Exh. 8), like Respondent Ross Brothers, has repudiated its collective-bargaining relationship with the International under NIMA. They have done so by unilaterally, and without consent, refusing to pay the wage and fringe benefit rates which they were obliged to pay under the NIMA Agreement. Such a failure is in derogation of Respondents' statutory obligations under Section 8(d) of the Act and they thereby engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. See *Oakcliff-Golman Baking Co.*, 202 NLRB 614 (1974); 207 NLRB 1063 (1973), enfd. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975).

On the above findings of fact and the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. The Respondents, Ross Brothers Construction Co., Inc. and Huntington Piping, Inc., and each of them, are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. (a) United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (the International Union or UA), is a labor organization within the meaning of Section 2(5) of the Act.

(b) Local No. 577, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following constitute units appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> (a) All United Association employees of Ross Brothers Construction Company now employed and employed in the future for maintenance, repair, replacement and renovation in various plants within the geographical jurisdiction of the United Association [but excluding] general superintendents, superintendents, assistant superintendents, office and clerical employees, watchmen or other professional supervisory employees as defined in the National Labor Relations Act, as amended.
>
> (b) All United Association employees of Huntington Piping, Inc. now employed and employed in the future for maintenance, repair, replacement and renovation in various plants within the geographical jurisdiction of the United Association [but excluding] general superintendents, superintendents, assistant superintendents, office and clerical employees, watchmen or other professional or supervisory employees as defined in the National Labor Relations Act, as amended.

4. At all material times herein the International Union (UA) has been the exclusive bargaining representative of the employees in the aforesaid units within the meaning of Section 8(f) of the Act.

5. Since June 1, 1992, by virtue of the terms of the collective-bargaining agreements between the International Union (UA) and the Respondents, Respondents have been, and are, obligated to pay to their employees in the units described in paragraph 3 hereof, on NIMA-obligated jobs, the wages and benefits specified in the current collective-bargaining agreement between Local No. 577, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, and the Mechanical Contractors Association of Southeastern Ohio.

6. Since on or about June 1, 1992, with respect to Respondent Ross Brothers Construction Co., and since on or about June 14, 1992, with regard to Respondent Huntington Piping, Inc. by unilaterally refusing to pay the wages and fringe benefits as described in paragraph 5 hereof to the employees in the aforesaid units according to the terms of the collective-bargaining agreements with the United Association, the Respondents have repudiated their statutory obligations to bargain with the International Union and have engaged in and are engaging in unfair labor practices within the meaning of Section 8(d) and Section 8(a)(5) and (1) of the Act.

THE REMEDY

Having found that Respondents have been engaged in certain unfair labor practices, I recommend that the Respondents cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act including the posting of the notice attached to this decision.

Since the Respondents, and each of them, in derogation of their statutory obligations, unilaterally refused to pay the wage rates and other financial contract benefits of their employees in the above units, under the terms of the NIMA collective-bargaining contracts covering the employees, I recommend that the Respondents, and each of them, be directed to implement the wage rates and other benefits in the collective-bargaining agreement between Local 577 and the Southeastern Contractors Association (G.C. Exh. 8) *for any project under NIMA coverage* and to hereafter refrain from making such unilateral changes in wages, rates of pay, or other terms or conditions of employment of its employees in the above-described appropriate units during the term of the NIMA contract without first reaching agreement with or receiving permission from the International Union concerning such contemplated changes. Further, I recommend that Respondents, and each of them, commencing June 1, 1992 (or June 14, 1992, in the case of Huntington Piping), make whole their employees in the above-described appropriate units for any losses they may have suffered as a result of Respondents' unilateral reductions in contract wage rates, benefits, and other contract terms and conditions of employment, *Ogle Protection Service*, 183 NLRB 682 (1970), and include thereon interest as computed in *New Horizons for the Retarded*, 233 NLRB 1173 (1987). Respondents will also make whole Local 577 for underpayments to fringe benefit funds, with interest, and employees for expenses incurred as a result of failure to make the fringe benefit contributions. *Gaucho Food Products*, 311 NLRB 1270 (1993).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondents, Ross Brothers Construction Company, Ashland, Kentucky, and Huntington Piping, Inc., Hunting, Weat Virginia, and each of them, and their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, as the exclusive representative of employees in the following units with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> (1) All United Association employees of Ross Brothers Construction Co., now employed and employed in the future for maintenance, repair, replacement and renovation in various plants within the geographical jurisdiction of the International Union (UA) [but excluding] general superintendents, superintendents, assistant superintendents, office and clerical employees, watchmen or other professional or supervisory employees as defined in the National Labor Relations Act, as amended.
>
> (2) All United Association employees of Huntington Piping, Inc., now employed and employed in the future for maintenance, repair, replacement and renovation in various plants within the geographical jurisdiction of the International Union (UA) [but excluding] general superintendents, superintendents, assistant superintendents, office and clerical employees, watchmen or other professional or supervisory employees as defined in the National Labor Relations Act, as amended.

(b) Instituting changes in wages, rates of pay, fringe benefits, or other terms and conditions of employment of employees in the above-described units during the effective term of the collective-bargaining agreement with the International Union (UA) covering the employees on any NIMA jobs without first reaching agreement with the International Union (UA) on any modification of the terms of the agreement.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Commencing June 1, 1992 (Respondent Ross Brothers Construction), or June 14, 1992 (Huntington Piping, Inc.), pay to all employees in the above-described units the wages at the wage rates, and pay to Local No. 577, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, the fringe benefits, prescribed in the agreement (effective 1992–1997) between Local 577 and the Mechanical Contractors Association of Southeastern Ohio, less any wages and fringe benefits previously paid respectively to the employees or Local 577, pursuant to any other formulation, on all such NIMA-obligated jobs; and make whole all such employees and Local 577 for any losses of wages or benefits they may have suffered by virtue of Respondents failure to pay such wages and benefits, with interest, on such wages and fringe benefits to be paid on the basis of the rates established and computed in *New Horizons for the Retarded*, supra, as set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay and fringe benefits due under the terms of the recommended Order.

(c) Post at Respondents' offices respectively, in Kentucky and West Virginia, copies of the notice attached marked ''Appendix.''[19] Copies of the notice on forms provided by the Regional Director for Region 9, after being signed by the Respondents' authorized representatives shall be posted by them immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by each of the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO (the United Association or the International), as the exclusive representative of employees in the following units with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> (1) All United Association employees of Ross Brothers Construction Co., now employed and employed in the future for maintenance, repair, replacement and renovation in various plants within the geographical jurisdiction of the International Union (UA) [but excluding] general superintendents, superintendents, assistant superintendents, office and clerical employees, watchmen or other professional or supervisory employees as defined in the National Labor Relations Act, as amended.
>
> (2) All United Association employees of Huntington Piping, Inc., now employed and employed in the future for maintenance, repair, replacement and renovation in various plants within the geographical jurisdiction of

the International Union (UA) [but excluding] general superintendents, superintendents, assistant superintendents, office and clerical employees, watchmen or other professional or supervisory employees as defined in the National Labor Relations Act, as amended.

WE WILL NOT institute changes in wages, rates of pay, fringe benefits, or other terms and conditions of employment of employees in the above-described units during the effective term of the collective-bargaining agreement with the International Union (UA) covering the employees or any NIMA jobs without first reaching agreement with the International Union (UA) on any modification of the terms of the agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, commencing June 1, 1992 (Respondent Ross Brothers Construction), or June 14, 1992 (Huntington Piping, Inc.), pay to all employees in the above-described units the wages at the wage rates, and pay to Local No. 577, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, the fringe benefits, prescribed in the agreement (effective 1992–1997) between Local 577 and the Mechanical Contractors Association of Southeastern Ohio, less any wages and fringe benefits previously paid respectively to the employees or Local 577 pursuant to any other formulation on all such NIMA-obligated jobs; and make whole all such employees and Local 577 for losses of wages or benefits they may have suffered by virtue of Respondents' failure to pay such wages and benefits with interest on such wages and fringe benefits.

ROSS BROTHERS CONSTRUCTION COMPANY

HUNTINGTON PIPING, INC.